

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE

CRIMINAL APPEAL NO.386 OF 1995

The State of Maharashtra ...Appellant.

V/s.

Shri Deepak Nanasaheb Dhavale ..Respondent
R/o Bopadi Gaon, R.B. Naik- (Orig.Accused)
Vit Bhatti, Near Bank of
River Side Zopad patti Pune-3.

Dr. F.R. Shaikh, A.P.P. for the Appellant/State.

None appeared for the respondent, though duly served.

**CORAM : S.S. PARKAR, &
 ANOOP V.MOHTA, JJ.**

DATE : 5TH MAY, 2005.

ORAL JUDGMENT (PER ANOOP V. MOHTA, J.)

. This is an State Appeal against the order of acquittal dated 15/7/1994, passed by the Additional Sessions Judge, Pune, whereby, the accused-respondent was acquitted for the offences punishable under Section 17 and 21 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as "NDPS Act"). The learned Judge held, that the prosecution failed to prove that the respondent-accused was found in possession of 1 gram and 700 Ml.gram brown sugar. As the provisions and procedure as contemplated under section 55 and 57 of the NDPS Act, though directory, but that affects and causes

prejudice to the respondent, therefore, by giving benefit of the same, acquitted the accused-respondent.

2. On 20/3/1993, at about 7.35 p.m. on receiving information, and recording the same, submitted the report to P.I. Vigilance Branch and with a permission, P.S.I. Babar (P.W. 4) completed the necessary formalities and went to the police Station Khadki at about 9.15 p.m. After submitting the report, the raiding party proceeded. Pune Bombay Road, near Naik Brick Kiln, after halting the jeep they started walking. They found the accused, on seeing the police he frightened. He was apprehended on the spot by P.S.I. Babar. The accused declined to offer himself before any Magistrate or the Gazetted Officer for the search, as contemplated under section 42 of NDPS Act. On search, they found 8 puddies containing 1 gram 700 M.grams brown sugar. The detailed panchanama was recorded. All the puddies were kept in polythene bags. The polythene bags thereafter were kept in brown paper envelope and it was sealed and labelled. The accused was arrested and taken to the police station Khadki. The complaint was lodged by P.S.I. Babar, accordingly. The property seized was deposited and recorded in the muddemal register of the

police Station Khadki by putting the sealed envelope in another pocket which was also seized with the seal of the police Station Khadki. The same was sent to the Chemical Analyser. As per Chemical Analyser's report the said brown powder found to be "diacetyl morphine" along with other "opium alkaloids". A.P.I. More (P.W.5) submitted the charge-sheet for the offence in question to which the accused pleaded not guilty and claimed to be tried. His defence was of total denial and false implication. The prosecution examined 5 witnesses, no defence witness was examined. Based upon the material on the record, the learned Sessions Judge has passed the impugned order of acquittal.

3. Heard learned A.P.P. Dr. F.R. Shaikh for the State of Maharashtra. None appeared for the respondent though duly served. We have gone through the record and noted the contentions as raised.

4. There is a sufficient material on the record that the brown powder of small quantity i.e. 1 gram 700 ml.gram was seized from the person of the accused-respondent. The raid was conducted at 9.45 p.m. between sun set and sun rise. The officer empowered to

search of seized articles as contemplated under section 42 of sub-section (1) of NDPS Act must have reason to believe that person has contravened the provisions of NDPS Act and he shall record the grounds for such beliefs that he can proceed without any warrant or authorisation. We have noted that there is no reference to this effect made on the record Exh.20 and neither in the testimony of P.S.I. Babar (P.W. 4).

5. P.S.I. Babar basically proved the prosecution case including all the compliance, as contemplated under section 42 and 50 of the NDPS Act. However, one important lacuna, as relied by the learned Judge, with regard to sealing of envelope and recording of the same in the register in which the brown paper was kept remained unsupported by the other police constable, Dadasaheb Waghmode (P.W.1), the muddamal clerk of the police station Khadki, in reference to Exh.10, was unable to explain the reason for not mentioning that he had received the sealed envelope from P.S.I. Babar. The learned Judge has observed on perusal of the entry at serial No. 71 at Exh.10, that there was no reference about the receipt of the sealed envelope from P.S.I. Babar. The defence suggestion put to the panch witness

Jagnnath Kirtawade (P.W.2) and P.S.I. Babar (P.W. 4) that no property was found in possession of the accused therefore raises doubt about the seizure of brown sugar in question in possession of the accused as alleged. The provisions of section 55 of the NDPS Act therefore, even though directory, non compliance of the same or lacunas in procedure definitely affect and or cause prejudice to the person concerned, like accused. In the Cross-examination Dadasaheb (P.W. 1) has admitted that he had not put the seal of the police station on the packet received by him from P.S.I. Babar. The Court has also observed that the envelope bears no seal of the police station, Khadki. Therefore, there is non compliance of section 55 of NDPS Act, and raises doubt whether the said property alleged to have been found in the possession of the accused and the same was sent to C.A., Pune.

6. The other lacuna which was noted by the learned Judge in reference to submitting a detailed report to his immediate superior officer as contemplated under section 57 of the NDPS Act. The evidence of P.S.I. Babar (P.W. 4) is silent on this issue. Even though the provision is directory in nature but in the facts and

circumstances of the case, and looking to the requirement, as contemplated under the scheme of the Act, such non compliance also raises doubt in the prosecution case. Therefore, the learned Judge has rightly considered all these aspects including the testimony of the witnesses and observed that non compliance of these directory provisions also injurious to the case of the prosecution. Such lacunas, in the totality of the matter, dislink the prosecution case.

7. The learned A.P.P. relied on **2001 CRI. L.J. 1166 (Gurbax Singh V. State of Haryana)** in support of his argument, that the provisions of Section 55, 57 are not mandatory and therefore, the order of acquittal as based is not correct. In the same judgment and in para 9 after considering the mandate of Section 52, 55 and 57 of the NDPS Act the Apex Court has observed as under;

"It is true that provisions of Sections 52 and 57 are directory. Violation of these provisions would not ipso facto violate the trial or conviction. However, I.O. cannot totally ignore these provisions and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article. In the present case, I.O. has admitted that the seal which was affixed on the muddemal article was handed over to the witness PW1 and was kept with him for 10 days. He was also admitted that the muddemal parcels were not

sealed by the Officer-in-charge of the police station as required under Section 55 of the NDPS Act. The prosecution has not led any evidence whether the Chemical Analyser received the same with proper intact seals. It creates a doubt whether the same sample was sent to the Chemical Analyser. Further, it is apparent that the I.O. has not followed the procedure prescribed under Section 57 of the NDPS Act of making full report of all particulars of arrest and seizure to his immediate superior officer."

The Apex Court therefore, on merit, in spite of mandate of section 55 and 57 allowed the appeal and set aside the order of conviction and acquitted the accused.

8. After considering the material on the record, as well as, the reasoning given by the learned Judge and the Apex court's decision in **Gurbax Singh** (Supra) and looking to the fact and circumstances of the case, as the alleged contra band goods were of small quantity, 1 gram 700 ml.gram, we are of the view that there is no case made out to interfere with the finding of the Sessions Court.

9. Therefore, the order of acquittal is confirmed. The appeal is dismissed. The bail bond shall stand cancelled.

[8]

[S.S. PARKAR, J.]

[ANOOP V. MOHTA, J.]